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No. 92-441

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

DAVID RANDALL JENKINS, STACIA LEE SUMWALT and THE JNC COMPANIES, an Arizona corporation,
Petitioners,

v.

ALAN D. DAVIDON, individually and in his official capacity as Deputy Pima County Attorney, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS' REPLY MEMORANDUM

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PETITIONERS' REPLY MEMORANDUM

In urging the Court to deny Petitioners' request for a writ of certiorari, the Pima County Respondents[1] and Respondent Beren raise several issues, all of which, Petitioners demonstrate, are without merit. Petitioners demonstrate herein that the Petition for Writ of Certiorari was timely filed and the issues raised by Petitioners in their Petition are worthy of the Court's consideration.

I. THE PETITION WAS TIMELY FILED.

By raising the issue that the Petition was untimely filed, the Pima County Respondents and Respondent Beren have taken exception to Petitioners' premise that the Court's jurisdiction is predicated upon the Ninth Circuit's final June 12, 1992 Order. See *JURISDICTION* section, Petition for Writ of Certiorari, pp. 2-4. In support of their arguments that the Court's jurisdiction should be predicated upon the Ninth Circuit's April 27, 1992 Order, the objecting Respondents suggest that the Ninth Circuit's June 12, 1992 Order did not disturb or revise legal rights and obligations which, by either the Ninth Circuit's March 2, 1992 Memorandum Decision or April 27, 1992 Order denying rehearing *en banc*, had been plainly and properly settled with finality. The objecting Respondents raise the issue that the instant Petition for Writ of Certiorari was filed out of time on September 1, 1992 and, as a result, the Court lacks jurisdiction to consider the merits of the Petition. In essence, the objecting Respondents argue that the Ninth Circuit's June 12, 1992 Order would not extend the time for applying for a writ of certiorari for the reason that it did not change any matters of substance. These arguments are in error.

On August 5, 1991, the Pima County Respondents and Respondents Beren and Boice filed their brief in opposition in the appeal to the Ninth Circuit and sought the affirmation of the District Court's final judgment of dismissal with prejudice and sanctions against the Petitioners for costs and attorney's fees for having filed a frivolous appeal.[2] On March 2, 1992, the Ninth

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[1] "Pima County Respondents" refers to Respondents Alan D. Davidon, Millard Rowlette, Stephen D. Neely, Jerry Goddard, Pima County, a body politic and corporate, Greg Lunn, Dan Eckstrom, Ed Moore, Reg Morrison, Raul Grijalva.

[2] See Exhibit B of Petitioners' October 5, 1992 *"APPLICATION TO STAY FINAL JUDGMENT OF UNITED STATES DISTRICT COURT FOR THE*

Circuit issued its Memorandum Decision holding (i) that the District Court had subject matter jurisdiction, (ii) that this Court's *Younger*[3] mandate did not bar the District Court's dismissal with prejudice even though the District Court assumed jurisdiction to interfere in state criminal proceedings without first finding that the state criminal proceedings had been undertaken in bad faith, to harass the Petitioners or for other exceptional circumstances, and (iii) that Petitioners' appeal was frivolous and awarded sanctions of only double costs against the Petitioners, although the Respondents had requested both costs and attorney's fees.

On May 11, 1992, the Pima County Respondents renewed their request for an award of attorney's fees on appeal solely based on the Ninth Circuit's March 2, 1992 determination that the appeal was frivolous.[4] On May 26, 1992, Petitioners filed their opposition to the renewed request for attorney's fees for the reason, among others, that the Ninth Circuit had already sanctioned Petitioners and nothing had occurred to merit further sanctions. Further, Petitioners provided the Ninth Circuit with an academic reference describing this Court's *Younger* mandate as analogous to a federal subject matter jurisdiction statute in support of the rationale for their appeal.[5] On June 12, 1992, the Ninth Circuit increased the award of sanctions against the Petitioners for having filed a frivolous appeal to include attorney's fees on appeal, thereby altering the sanctions imposed by its March 2, 1992 Memorandum Decision.

When the demand for attorney's fees itself is part of the merits, finality does not exist until the attorney's fees question is determined. *Liberty Mutual Insurance Co. v. Wetzel*, 424 U.S.

DISTRICT OF ARIZONA," an excerpt from the Brief of Appellees before the Ninth Circuit, which is incorporated herein by this reference.

[3] Younger v. Harris, 401 U.S. 37 (1971).

[4] Although the Pima County Respondents' May 11, 1992 request for attorney's fees was, in substance, a motion to reconsider an award of attorney's fees, the motion was treated as timely filed by the Ninth Circuit in apparent reliance on the April 27, 1992 Order date.

[5] See Exhibit E of Petitioners' October 5, 1992 "*APPLICATION TO STAY FINAL JUDGMENT OF UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA*," Petitioners' May 26, 1992 opposition to the Respondents' second request for attorney's fees, which is incorporated herein by this reference.

730, 740-742 (1976). The facts in *Liberty Mutual* are analogous to the facts in the case at bar.

The Respondents (i) had sought an award of attorney's fees in their August 5, 1991 opening brief in the appeal before the Ninth Circuit as an integral part of their merits recovery, (ii) were initially awarded only double costs by the Ninth Circuit in its March 2, 1992 Memorandum Decision, (iii) subsequently again moved for an award of attorney's fees on May 11, 1992 as a further sanction for the same conduct and (iv) were finally awarded that requested relief by the Ninth Circuit on June 12, 1992. The very injury the Respondents sought to remedy was the injury incurred by being forced to file a brief in opposition, in an appeal they believed to be frivolous. As a result, their initial request for attorney's fees included in their brief in opposition was part and parcel of the remedy they sought for the injury they believed they had incurred, and was not collateral to the remedy sought.

In *Liberty Mutual*, this Court held that since the merits recovery specifically prayed for an award of attorney's fees to redress the claim for relief pleaded therein, the adjudication by the District Court for appeal purposes under 28 U.S.C. §1291 was not final until the claim for attorney's fees was determined. *Liberty Mutual, supra*. In this case, once the Respondents filed their May 11, 1992 motion for attorney's fees, which renewed their request for that relief, the time for Petitioners to file their Petition for Writ of Certiorari was tolled until the Ninth Circuit determined that motion. That determination could, and did, materially amend Petitioners' legal liability engendered by the March 2, 1992 Memorandum Decision. Indeed, the basis for the sanction was inextricably intertwined with the decision on the merits. As a result, the adjudication by the Ninth Circuit was not final, in a *Liberty Mutual* context, until June 12, 1992.

Respondent Beren also relies on this Court's decision in *Federal Trade Commission v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206 (1952) in arguing that the Petition is untimely. Respondent Beren argues that *Minneapolis-Honeywell* suggests that a substantive change in a judgment not affecting the portion sought to be reviewed does not extend the time for seeking review of the unchanged portion. That analysis mischaracterizes *Minneapolis-Honeywell*.

As indicated in *Minneapolis-Honeywell*, the test is a practical one. The question is whether the lower court, in its second order,

has disturbed or revised legal rights and obligations which, by its prior judgment, had been plainly and properly settled with finality. *Id*, at 212. Since the Respondents had prayed for sanctions including costs and attorney's fees in their opening brief, the Ninth Circuit's March 2, 1992 Memorandum Decision created the appearance of finality. It awarded sanctions and led Petitioners to believe the extent of the sanction, limited to double costs, reflected the Ninth Circuit's assessment of the extent of the frivolity. What the Ninth Circuit awarded as sanctions was completely within its discretion. Rule 38, Fed.R.App.P., 28 U.S.C. As a result, when the Respondents moved again for an award of attorney's fees on May 11, 1992 they were requesting the Ninth Circuit to revisit an issue that had been determined with finality on March 2, 1992. When the Ninth Circuit determined the award of attorney's fees on June 12, 1992, it altered the legal liability incurred by these Petitioners for having filed a frivolous appeal since the basis for the additional sanction was the same as for the original sanction. Thus, in *Minneapolis-Honeywell* terms, the second order changed the legal liability imposed by the first order. As a result, the time for filing the Petition for Writ of Certiorari in the instant case is properly determined on the basis of the June 12, 1992 Order and the Ninth Circuit's first order, the March 2, 1992 Memorandum Decision, is subsumed therein for purposes of review by this Court.

The Ninth Circuit's final action in this case occurred on June 12, 1992. Therefore, the 90 day period prescribed in 28 U.S.C. §2101(c) for filing a petition for writ of certiorari in this Court is determined by reference to the June 12, 1992 Order. Based on the foregoing, this Court has jurisdiction to review the Ninth Circuit's memorandum decision and orders denying rehearing *en banc* and awarding of attorney's fees on appeal against the Petitioners pursuant to Section 1254(1) of Title 28, United States Code.

II. COMPELLING THE LOWER COURTS TO FOLLOW THIS COURT'S DECISIONS IS A SUFFICIENT REASON FOR GRANTING CERTIORARI.

Respondent Beren raised the question that the issues presented in the Petition do not warrant review. The issues raised in the Petition suggest that the lower Courts refused to follow this Court's decisions in *Younger* and *Deakins v. Monaghan*, 484 U.S. 193 (1988). The refusal of the lower Courts to follow this Court's

Younger and *Deakins* mandates is sufficient grounds for immediate relief from this Court. *Jaffree v. Board of School Commissioners of Mobile County*, 459 U.S. 1314 (1983) (Powell, J.). The Petition indicates the Ninth Circuit did not follow its own decisions. See Petition for Writ of Certiorari, at p. 18. Accordingly, the issue is certworthy.

III. THE DISTRICT COURT ABUSED ITS DISCRETION IN DISMISSING THE AMENDED COMPLAINT WITH PREJUDICE.

Both the Pima County Respondents and Respondent Beren indicate that the District Court's dismissal with prejudice was predicated upon Rules 8(a), 8(e), 21 and 41(b), Fed.R.Civ.P., 28 U.S.C. This assertion, in part, is in error. The District Court's February 7, 1991 Order clearly indicates that Rules 8(a), 8(e) and 41(b) govern its decision to dismiss with prejudice. See Petition for Writ of Certiorari, at p. A-12. Therefore, no violation of Rule 21 served as a basis for the District Court's dismissal with prejudice.[6]

The District Court, by its February 7, 1991 Order, did grant Petitioners leave to file a further amended complaint within ten days limited to fifteen (15) pages. Petitioners pleaded the unreasonable nature of this limitation in their motion for reconsideration for the reason that the complaint named over forty (40) defendants and fifty (50) claims for relief. Petitioners also requested the District Court explain how they were to meet their heavy pleading burden. Rather than adjust its prior command, the District Court entered a final judgment of dismissal with prejudice.

The District Court abused its discretion in dismissing the amended complaint with prejudice for the foregoing reasons and the reasons cited in the Petition and for another insidious purpose.

The record in the proceedings below circumstantially indicate that the District Court Judge improperly employed Rule 8 to preclude the Petitioners from proving, in an evidentiary hearing,

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[6] By the District Court's September 7, 1990 Order granting leave to amend, which that Order was unqualified, Petitioners believed that they could amend their original complaint in any manner whatsoever, including naming additional parties. There could be no prejudice to the additional parties since there was no expiration of any limitation of action time period. As a result, Petitioners could have achieved the same effect by merely filing a separate complaint.

an $80 million automatic stay violation and numerous acts of bankruptcy fraud occurring with the knowledge of the Bankruptcy Court Judge involved. District Court case number CIV-90-315-TUC-WDB involved an appeal from the Bankruptcy Court's affirmation of a settlement agreement between Admiral Insurance Company[7] and a majority of the JNC Investors. During the pendency of that appeal, the District Court,[8] on or about October 1, 1990, in several related cases involving disputes between Admiral and certain JNC Investors, entered an order that made a factual finding that Admiral was the legal owner of certain JNC-related investor notes receivable. On October 31, 1990, Jenkins and JNC then filed their "Third Motion To Take Judicial Notice Of Other Adjudicative Facts; Motion To Remand For Evidentiary Hearing To Determine Violation Of Automatic Stay" in the matter of CIV-90-315-TUC-WDB.

That motion pleaded that Admiral had committed a fraud on the District Court by inducing the District Judge into making a finding of fact that Admiral was the legal owner of approximately $80 million of notes receivable that are the property of the JNC-related bankruptcy estates. In support of that claim, Petitioners Jenkins and JNC requested the District Court to take judicial notice of affidavits filed by Admiral in the Bankruptcy Court that alleged the notes were collaterally assigned to the Note Lenders as compared to affidavits filed by Admiral in the Admiral-JNC Investor litigation that claimed that Admiral owned the notes receivable. The fact that the notes receivable had been collaterally assigned was found by the Ninth Circuit, to wit:

> ". . . JNC then borrowed money from various lenders and assigned the investor notes to the lenders as collateral."
>
> *Admiral Insurance Company v. U.S. Dist. Ct. for Dist. of Ariz.*, 881 F.2d 1486, 1488 (9th Cir. 1989).

The docket for CIV-90-315-TUC-WDB reveals that the bankruptcy files were returned to the District Judge's chambers on

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[7] Admiral Insurance Company is represented by Respondents Susan G. Boswell and Streich Lang, P.A. in the JNC-related Bankruptcy Court litigation.

[8] The District Judge was the same District Judge in the proceedings below.

November 6, 1990, immediately after the foregoing motion to take judicial notice had been filed. Thereafter, the District Court denied the foregoing motion to take judicial notice.[9]

The rulings of the District Court precluded an evidentiary hearing in which the evidence would have revealed the foundation of a scheme to employ the criminal process of the State of Arizona to oppress Jenkins and JNC. The oppressive criminal proceedings were not undertaken for the purpose of obtaining valid convictions. Indeed, the State has already dismissed JNC with prejudice. Rather, the criminal proceedings were undertaken to thwart Petitioners' abilities to prove their claims in the District Court and Bankruptcy litigation that Admiral violated the Bankruptcy Code's automatic stay provisions by usurping ownership of $80 million of bankruptcy estate assets.[10] These assets were the notes receivable from the JNC Investors. Admiral and Respondent Boice, among others, participated in numerous acts of bankruptcy fraud, by retaining false claims of liability against the JNC-related bankruptcy estates to defeat the provisions of Title 11, in violation of 18 U.S.C. §152.[11] These acts were undertaken to afford the

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[9] The documentation evidencing the foregoing were part of the new exhibits submitted in support of Petitioners' December 21, 1990 first amended complaint in the proceedings before the District Court.

[10] Admiral violated the automatic stay so as not to cause a "transfer" within the meaning of 26 U.S.C. §108(e)(5). Admiral insured the JNC Investors' obligations under the Investor Notes to the Note Lenders. Upon paying claims to the Note Lenders, Admiral usurped possession of the Investor Notes from the Note Lenders without an Orde. from the Bankruptcy Court. Thereafter, had Admiral first moved to lift the automatic stay, foreclosed on the JNC Partnerships' ownership interests in the Investor Notes and then sued the JNC Investors for collection thereon, when Admiral cancelled the JNC Investors' indebtedness the JNC Investors could not avail themselves to the relief provisions of 26 U.S.C. §108(e)(5) to avoid recognizing debt relief income. See the Senate Conference Report from the Bankruptcy Tax Act of 1980 at S.Rept.No. 96-1035 (P.L. 96-589) pp. 16-17.

[11] Admiral, among others, retained false claims of liability against the JNC-related limited partnership bankruptcy estates to forestall a decrease in the JNC Investors' tax basis of their limited partnership interests. Admiral paid claims to certain Note Lenders pursuant to the terms of certain financial guaranty bonds, which such payments indirectly extinguished loans owing by the JNC Partnerships. That occurred in 1987 and 1988. As a result of those payments, the JNC Partnerships' liabilities should have been reduced, thereby reducing the tax basis of the JNC Investors to zero and triggering recapture income pursuant to 26

JNC Investors a tax-free release of their obligations to pay the JNC bankruptcy estates $80 million.[12]

On September 7, 1990, the District Court, in the proceedings below, granted Petitioners' motion to take judicial notice of many pleadings in the state criminal proceedings. On November 15, 1990, after the District Judge was made well aware of conflicting affidavits submitted by Admiral regarding ownership of the JNC Investor Notes, the District Court vacated its September 7, 1990 Order granting the Petitioners' motion below to take judicial notice.

Thereafter, the District Court dismissed the CIV-90-305-TUC-WDB first amended complaint with prejudice, pursuant to Rules 8(a), 8(e) and 41(b), Fed.R.Civ.P., 28 U.S.C., for being too long. Apprised of the foregoing facts and circumstances, a reasonable person could conclude that the District Court knowingly and intentionally ignored this Court's *Younger* mandate and invoked Rule 8 to preclude any evidentiary hearing that would reveal Admiral's automatic stay violation and the acts of bankruptcy

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U.S.C. §§1245 and/or 1250. In November 1989, Admiral entered into a settlement agreement with the JNC Investors, indemnifying the JNC Investors against collection on the $80 million of notes receivable. The JNC Investors intended to invoke the purchase price reduction exclusionary relief of 26 U.S.C. §108(e)(5) to avoid recognizing debt relief income, but could not benefit from that provision if their tax basis was zero. As a result, Admiral and Respondent Boice, among others, retained false claims of liability against the bankruptcy estates of the JNC Partnerships to retain a false tax basis, thereby evading recapture income in 1987 and 1988 and evading debt relief income in 1989 by providing a false tax basis for 26 U.S.C. §108(e)(5) exclusionary relief.

Admiral was proscribed by the Uniform Insurance Code from having any interest in any Partnership Note. A.R.S. §20-1547. Since Admiral was a beneficiary under trust deeds secured by the JNC Partnerships' real properties, coupled with the fact that Admiral transacted other lines of insurance business, it was precluded by the monoline mortgage guaranty insurance statute from having any interest in a Partnership Note. In Arizona, A.R.S. §20-1547 proscribes an insurance company from transacting mortgage guaranty insurance if that company transacts insurance business in other lines of insurance. In Arizona, mortgage guaranty insurance involves the insurance of a note that is secured by a security interest in real property. See A.R.S. §20-1541(3). As a result of the foregoing, Admiral was proscribed by Arizona law from having any interest in the Partnership Notes, including any subrogation right to the Note Lenders' interests in the JNC Partnerships' Notes.

[12] See the Arizona Court of Appeals' decision in JNC Companies v. Meehan, which is included in the Petition for Writ of Certiorari at p. C-1.

fraud. The District Court had an interest in preserving the propriety of its factual finding that Admiral was the legal owner of the notes receivable and preserving numerous dismissals of the Admiral-JNC Investor suits. The truth is, that the Bankruptcy Judge failed to stop a glaring automatic stay violation and knowingly tolerated numerous acts of bankruptcy fraud to further the pecuniary interests of favored parties appearing before him.[13] The District Court's affirmation of the conduct of the Bankruptcy Judge amounts to a cover-up of judicial malfeasance, under color of law, and is designed to thwart the Petitioners' efforts to reorganize.

Based on the foregoing and the arguments in the Petition for Writ of Certiorari at pp. 20-27, and in view of the procedural history of this case, it is unequivocal that the District Court abused its discretion in dismissing the first amended complaint with prejudice pursuant to Rules 8(a), 8(e) and 41(b), Fed.R.Civ.P., 28 U.S.C.

IV. *YOUNGER* BARRED THE EXERCISE OF THE DISTRICT COURT'S JURISDICTION.

The Petition briefs Petitioners' position that *Younger* barred the exercise of the District Court's jurisdiction over the amended complaint's equitable claims and that *Deakins* barred the District Court's exercise of jurisdiction over the amended complaint's money damage claims. See Petition for Writ of Certiorari, at pp. 14-20. Nothing contained in either the Pima County Respondents' brief in opposition or Respondent Beren's brief in opposition affects the *Younger* and *Deakins* bar to the exercise of jurisdiction.

The Pima County Respondents argue that the Court's decision

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[13] Petitioner Jenkins filed a complaint for judicial misconduct against the Bankruptcy Judge in the Judicial Council for the Ninth Circuit for usurping jurisdiction not otherwise granted to him by Congress when it enacted the Bankruptcy Code and specifically barred by this Court in *Younger* when he authorized the trustee in bankruptcy to plea bargain JNC to a felony conviction in the state criminal proceedings over the objection of Jenkins and JNC. Petitioner Jenkins alleged the Bankruptcy Judge attempted to insure JNC's conviction to cover-up Admiral's automatic stay violation and the numerous acts of bankruptcy fraud occurring in the Bankruptcy Court. The Judicial Council held that the complaint failed to state a claim against the Bankruptcy Judge since he acted in his judicial capacity.

in *Sosna v. Iowa*, 419 U.S. 393 (1975), supports their position that *Younger* is not a bar in the instant case. The Court exercised its jurisdiction in *Sosna* because the parties did not raise *Younger* as a bar. In the instant case, both the Pima County Respondents and Respondent Beren, in pleadings filed in the District Court below, raised *Younger* as a bar to the exercise of the District Court's jurisdiction. As a result, *Sosna* is inapposite in the instant case.

Nonetheless, the Federalism and comity interests identified in *Younger* are neither the interests of the Pima County Respondents nor Respondent Beren. They are the interests of the State of Arizona, a non-party. Although some of the Pima County Respondents represent the State of Arizona in the ongoing criminal proceedings, they are barred by the Rules of the Arizona Supreme Court from waiving that interest for the reason that they have a conflict of interest and cannot obtain a waiver of that conflict from the State of Arizona. See, ER 1.7(b) and ER 1.13(e), Rule 42, Rules of the Arizona Supreme Court, 17A A.R.S.; *Rice v. Baron*, 456 F.Supp. 1361, 1376 (S.D.N.Y. 1978) [corporate directors accused of breaching fiduciary obligations cannot consent on behalf of the corporation to dual representation of the corporation and directors]. Accordingly, the *Younger* and *Deakins* bar stands until either these Petitioners make a showing that the criminal proceedings were undertaken in bad faith, to harass them, or for other exceptional circumstances or until the criminal proceedings are resolved.

CONCLUSION

For these substantial reasons, the issues raised in the Petition are worthy of this Court's review, and Petitioners pray that this Court grant their Petition.

Respectfully submitted,

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